

FEDERAL MAGISTRATES COURT OF AUSTRALIA

FU & ANOR v MINISTER FOR IMMIGRATION [2006] FMCA 1838
& ANOR

MIGRATION – Application for a subclass 850 visa – de facto relationship – application refused by the respondent Minister as relationship had “broken down” – Tribunal found that the application did not meet the requirements of sub-regulation 1.15A(2)(e) – Tribunal’s findings were not “harsh or unfair” – findings of fact are for the decision maker “par excellence” – Tribunal’s findings were based on evidence – Tribunal is not required to refer to a piece of evidence if it did not rely on it – error of law found on one basis does not affect validity of a decision as a whole – compelling or compassionate circumstances did not exist – no jurisdictional error – application dismissed.

Migration Act 1958, ss.91X, 359(2), 359A, 424A
Migration Regulations 1994, Regulations 1.12AA, 1.15A, 1.15A(2)(e)
Family Law Act 1975

Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham [2000] HCA 1
MZWBW v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 94
Applicant A169/2003 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 8
NAAP v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 6
SZGBD v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 431
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 24
Al Shamry v Minister for Immigration & Multicultural Affairs [2000] FCA 1679
SZEEU v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCAFC 2
Minister for Immigration & Multicultural & Indigenous Affairs v Yusuf (2001) 206 CLR 323
WAEE v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 75 ALD 630
VBAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 965
SZDXC v Minister for Immigration and Multicultural and Indigenous Affairs

[2005] FCA 1306
MZWPK v Minister for Immigration and Multicultural and Indigenous Affairs
[2005] FCA 1256
Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 72
NAJT v Minister for Immigration and Multicultural and Indigenous Affairs
[2006] FCAFC 134
Re Minister for Immigration and Multicultural Affairs Ex parte Applicant S20/2002 (2003) 77 ALJR 1165
Singh v Minister for Immigration and Multicultural and Indigenous Affairs
(2001) 109 FCR 152
NABE v Minister for Immigration and Multicultural and Indigenous Affairs
(No 2) [2004] FCAFC 263
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Babicci v Minister for Immigration and Multicultural and Indigenous Affairs
[2005] FCAFC 77

Applicant:	YAN FU & ANOR
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 152 of 2005
Judgment of:	Nicholls FM
Hearing date:	27 June 2006
Date of Last Submission:	22 June 2006
Delivered at:	Sydney
Delivered on:	15 December 2006

REPRESENTATION

Counsel for the Applicant: Mr. B. Zipser (Direct Access)

Solicitors for the Applicant: Nil

Counsel for the Respondents: Phillips Fox

Solicitors for the Respondents: Ms. S. A. Sirtes

ORDERS

(1) The application is dismissed.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 152 of 2005

YAN FU & BRENDAN FU
Applicants

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application filed in this Court on 19 January 2005 seeking review of the decision of the Migration Review Tribunal (“the Tribunal”) made on 12 January 2005 to affirm the decision of a delegate of the respondent Minister made on 6 February 2003 to refuse the grant of visas to the applicant and her son. The Tribunal is joined as the second respondent in these proceedings.

Background

2. The Minister has filed a bundle of relevant documents in this matter titled Court Book (“CB”). The Tribunal’s decision is reproduced at CB 198 to CB 216. I note that the Tribunal gave a direction pursuant to s.378 of the *Migration Act 1958* (“the Act”) restricting publication of

information that would identify the applicant and others involved in this matter. No application was made by the applicant, (or on behalf of her son), to suppress publication of their names. Nor is this a matter that falls within s.91X of the Act. Nonetheless, for ease of reference and consistency with the material appearing in the Court Book I will refer to the various parties involved in this matter by the pseudonyms assigned by the Tribunal in its decision record, and as referred to in written submissions by both the applicant and the respondent's legal representatives before the Court now.

3. In outline the relevant background circumstances with reference to the Court Book are:

- 1) The applicants before the Court now are “Ms. ABC” (hereinafter referred to as the applicant), who was born in the People's Republic of China and came to Australia in May 1995, and her son who was born in January 2001 and is referred to by the Tribunal as “XYZ” (referred to hereinafter as “the applicant’s son”).
- 2) On 27 February 1998 a “Mr. AHC” made an application for a subclass 850 (Resolution of Status (Temporary)) visa, and a Resolution of Status subclass 851 visa (CB 1 to CB 7).
- 3) The applicant was included as Mr. AHC’s (“de facto”) spouse in Australia (see CB 4).
- 4) The applicant was listed as a “secondary” applicant in that application as the outcome of her application was dependent on being recognised as a member of Mr. AHC’s family unit, and was dependent on the success of his application.
- 5) Mr. AHC was granted a subclass 851 Resolution of Status (Permanent) visa on 6 February 2003 (CB 106).
- 6) Prior to that time the applicant's son had been born, and he had also been included as a “secondary” applicant in that application (CB 48 to CB 53).
- 7) The applicant’s, and her son’s, application for this visa was refused by the Minister’s delegate on 6 February 2003 on the basis that

the relationship between the applicant and Mr. AHC had “broken down” (see CB 107 to CB 112).

- 8) The applicant sought review of this decision by the Tribunal on 24 September 2003 (CB 113 to CB 117).
- 9) Although the applicant's son was not included in this application the Tribunal “treated the application for review as including” the applicant’s son (CB 199.4).

4. Before the Tribunal:

- 1) By letter dated 16 September 2003 the Tribunal invited the applicant to comment on information relating to evidence that the applicant and Mr. AHC had separated (from their de facto relationship) in March 2002 (CB 132 to CB 134).
- 2) By way of the same letter sought information from the applicant relating to the applicant's son and as to whether Mr. AHC had any obligations towards the applicant’s son pursuant to the *Family Law Act 1975*, or any other maintenance obligation. The applicant was notified as to the relevance of this information, and comments were required by 23 October 2003.
- 3) The applicant’s then migration adviser sought an extension of time for the applicant to respond (CB 136).
- 4) The Tribunal responded by letter dated 22 October 2003 (CB 137 to CB 138). The request for an extension of time to respond in relation to the information going to the separation of the applicant and Mr. AHC was refused.
- 5) An extension of time however was granted for the provision of information relevant for the purposes of regulation 850.321(3) of the *Migration Regulations 1994* (“the Regulations”) (relevant to the issue of the separation of Mr. AHC and the applicant and whether she was a member of the family of Mr. AHC).
- 6) The applicant’s migration adviser responded by letter dated 22 October 2003 attaching copies of various documents (CB 139 to CB 143).

- 7) By letter of 30 January 2004 the Tribunal invited the applicant to comment on certain information, being information provided by Mr. AHC to the first respondent's Department, and information provided by the applicant to the first respondent's Department, which was relevant to the review, in that it suggested that the applicant and Mr. AHC were not living in a de facto relationship for the period of 12 months before 13 June 1997, or at the date of application (being the relevant times for the purposes of the relevant legislation). These comments were required by 12 March 2004 (CB 144 to CB 145).
- 8) The Tribunal also requested further information such as it might demonstrate that the applicant and Mr. AHC were in a genuine and continuing relationship as at the date of the application and for the period of 12 months preceding 13 June 1997 (being the relevant time required by the relevant legislation) (CB 145.5).
- 9) The Tribunal advised the applicant that if it did not receive any comments by the period allowed, that it may proceed to make a decision on the review pursuant to s.359C of the Act without taking any further action to obtain comments.
- 10) The Tribunal also requested further information as to whether there was any evidence of any compelling and compassionate circumstances for the grant of a visa in the event that the Tribunal found that the applicant and Mr. AHC were not in a de facto relationship for the 12 months preceding 13 June 1997 (CB 145).
- 11) The applicant's adviser responded on her behalf (CB 147), and provided documentation in support (CB 148 to CB 160).
- 12) On 9 March 2004 the applicant was invited to a hearing before the Tribunal scheduled for 5 May 2004 to give evidence and present arguments in support of her claim (CB 161 to CB 162).
- 13) The applicant confirmed on 16 March 2004 that she did wish to appear before the Tribunal and requested the Tribunal to take evidence from "my friends" (CB 163).

- 14) The applicant also provided to the Tribunal a statutory declaration made on 29 March 2004 in support of her claims (CB 165 to CB 170).
- 15) Also put before the Tribunal were a number of documents said to be receipts for purchases (jewellery) (CB 171 to CB 173), a statutory declaration of one of the applicant's friend's (CB 174 to CB 175) and a letter from the Australian Government Child Support Agency (CB 177 to CB 179).
- 16) By letter dated 12 July 2004 the Tribunal also sought further comment on information pursuant to s.359A of the Act, specifically that in the application lodged by Mr. AHC he stated that the de facto relationship with the applicant had commenced on 20 July 1996. The Tribunal notified the applicant that the relevance of this information to the review was that it would support a finding that at the time of the application for the visa, the applicant and Mr. AHC did not meet the requirements of subregulation 1.15A(2)(e) of the relevant definition of spouse as it applied to this application (CB 180 to CB 181).
- 17) The applicant's response is at CB 182.
- 18) By letter dated 21 October 2004 the Tribunal provided an invitation to the applicant to provide further information pursuant to s.359(2) of the Act relating to the issue of whether the applicant's son could meet the criteria for the grant of a subclass 850 visa as a "secondary" applicant, which required the Tribunal to consider whether he was the dependent child of Mr. AHC (CB 188 to CB 189).
- 19) The applicant responded by a statutory declaration (CB 192 to CB 193).
- 20) At the hearing held on 5 May 2004, the applicant gave evidence as did two of the applicant's friends (Ms. FGP and Ms. GHJ) and the sister of the applicant (Ms. PQR). (See CB 201.7 to CB 203.7 for what occurred at the hearing).

Tribunal's Findings

5. The Tribunal's "Findings and Reasons" are set out in its decision record and reproduced at CB 204 to CB 216. The Tribunal found:
- 1) The only relevant subclass of visa in respect of which claims had been advanced was subclass 850 (Resolution of Status (Temporary)) visa.
 - 2) The application was made on the basis that Mr. AHC was a citizen of China, and that the applicant was included in his application as his spouse.
 - 3) That if an applicant (in this case Mr. AHC) for a subclass 850 visa satisfies the relevant "primary" criteria, as a member of the immediate family of the applicant (such as the applicant in this case, if she was his spouse) or a dependent child of the spouse of the applicant (such as the applicant's child in this case), then they would be eligible for grant of a visa if such a person satisfied the relevant "secondary criteria" (CB 204.4).
 - 4) Given what had been put before it, it considered the criteria applicable as at the time of application and the time of the decision (CB 204.5).
 - 5) It identified the relevant time of application criteria, for a "secondary" applicant for subclass 850 visa, as those contained in clause 850.311 [of Schedule 2 of the Regulations].
 - 6) It assessed the applicant's claims against regulation 1.12A(a) of the Regulations, which defines "a member of the immediate family".
 - 7) It noted that the applicant had relevantly stated that as at the time of her visa application, she was the spouse of Mr. AHC (CB 205.2).
 - 8) It noted that the term "spouse" is defined by regulation 1.15A of the Regulations (CB 205.3).
 - 9) As the applicant and Mr. AHC had never been married to each other, and as they claimed to have been in a de facto relationship, it had to decide whether they were in a de facto relationship (as

defined in sub-regulation 1.15A(2) as at the time of application) (CB 207.9).

- 10) That paragraph (e) of sub-regulation 1.15A(2) requires that the applicant and Mr. AHC meet the requirements of subregulations 1.15A(2)(e)(i), (ii) and (iii) for the period of 12 months immediately preceding 13 June 1997, unless the applicant could establish “compelling and compassionate” circumstances for the grant of the visa (CB 207.9).
- 11) It was not satisfied that the applicant and Mr. AHC met the requirements of subregulations 1.15A(2)(e)(i), (ii), and (iii) for the period of 12 months before 13 June 1997 (CB 212.4).
- 12) That it did not consider that there were compelling and compassionate reasons for the grant of visa, and accordingly, that the applicant was not the “spouse” of Mr. AHC as defined in regulation 1.15A at the time of application (CB 213.6).
- 13) In relation to the applicant’s son, it was not satisfied that he could be regarded as being wholly or substantially in the daily care and control of Mr. AHC, and therefore was not “the dependent child” of Mr. AHC, or a member of his immediate family, and therefore did not meet the requirements of subclause 850.321(2) [Schedule 2 of the Regulations] (CB 215.9).
- 14) That the applicant did not meet the prescribed criteria at the time of application, and the applicant’s son did not meet the prescribed criteria at the time of decision, and therefore the decisions in relation to both, to refuse the grant of the subclass 850 visa, must be affirmed (CB 216.4).
- 15) Also that at the time of application, the applicant was not a member of the immediate family of Mr. AHC, and she did not meet clause 450.211 of the subclass 450 visa. Further, the applicant’s son was required to meet clause 450.211, which required that the applicant continued to satisfy clause 450.211, that is, that the applicant was a member of the immediate family of Mr. AHC (CB 216.5).

16)The applicant's son was not a member of the immediate family of Mr. AHC, or a dependent child of the spouse of Mr. AHC, and did not meet clause 450.211 (CB 216.6).

17)Neither the applicant, nor the applicant's son met the criteria for a grant of the subclass 450 visa (CB 216.7).

Grounds

6. At the hearing before the Court Ms. Sirtes appeared for the respondent, and Mr. Zipser appeared for the applicants. The applicant's mother was appointed as litigation guardian for the purposes of these proceedings.
7. Mr. Zipser sought to proceed on an amended application for which leave was granted. This was formally filed in Court subsequent to the hearing. I should also note that during the hearing leave was also granted for the applicant, subsequent to the hearing, to provide case references in support of submissions. This opportunity was taken up by Mr. Zipser (see below). The draft amended application before the Court at the time of the hearing contained four grounds of review. At the hearing Mr. Zipser submitted that the applicant would not proceed with ground three as in light of s.507 of the Act this ground of complaint was not available to the applicant.
8. The grounds of complaint therefore, ultimately before the Court are:
 - 1) "The Tribunal found that 'the earliest date from which it could be said that the review applicant and Mr AHC were in a de facto relationship meeting subregulation 1.15A(2) was 20 July 1996' (CB 212.1). The Tribunal fell into jurisdictional error in making this finding. Specifically, the Tribunal wrongly assumed that an element of a de facto relationship was that two people were living together in premises in which they shared rent. Two people can commence a de facto relationship before they commence living together in premises in which they share rent."
 - 2) "The Tribunal found that it was 'not satisfied that the relationship between [the applicant and Mr AHC on 20 July 1996] involved mutual commitment to a shared life as husband and wife to the exclusion of all others as required by subparagraph 1.15A(2)(c)(i)

(CB 212.3). The Tribunal fell into jurisdictional error in making this finding. Specifically:

- The evidence reviewed by the Tribunal suggested that at the time the applicant and Mr. AHC commenced living together the relationship involved a mutual commitment to a shared life as husband and wife to the exclusion of all others. There was no evidence to suggest otherwise.
 - In making this finding, the Tribunal appears to have taken into account the fact “that Mr BGH [the applicant's former husband] was for at least some time at the address in West Ryde” (CB 212.3). This event, which occurred in 1998, is irrelevant to whether the applicant and Mr. AHC were in a de facto relationship when they commenced living together on 20 July 1996.
 - In making this finding, the Tribunal appears to have taken into account the searches of premises in which the applicant lived on 15 April 1998 and 16 August 2001 (see CB 9 and 54) or the anonymous complaints made to the Department on 15 November 1998 (CB 131) and 9 April 1999 (CB 32). If so, the “Tribunal failed to put these matters to the applicant in writing as required under s.359A of the Migration Act, giving rise to jurisdictional error.”
- 3) “The Tribunal did ‘not consider that there are compelling and compassionate reasons for the grant of the visa’ to the applicant (CB 213.5). The Tribunal fell into jurisdictional error in making this finding. Specifically, the Tribunal failed to have regard to the 10 year period the applicant has lived in Australia and the disruption which would be caused to her life if she was required to return to China.”

Legislation

9. Legislation relevant to the consideration of the applicant's complaints now before the Court is (as at the relevant time):

- ***Schedule 1 to the Migration Regulations 1994***

“1216A. Resolution of Status (Temporary) (Class UH)

(4) Subclasses:

450 (Resolution of Status -- Family Member (Temporary))

850 (Resolution of Status (Temporary)).”

• ***Schedule 1 to the Migration Regulations 1994***

“Subclass 850 Resolution of Status (Temporary)

850.31 Criteria to be satisfied at time of application

850.311 The applicant is:

(a) a member of the immediate family of a person (the principal person) who:

(i) has made an application for a Resolution of Status (Temporary) (Class UH) visa mentioned in paragraph 1216A (3) (a) of Schedule 1; and

(ii) on the basis of the information provided in that application, appears to satisfy the criteria in Subdivision 850.21; or

(b) a dependent child of the spouse of the principal person, being a spouse who is an applicant for a Resolution of Status (Temporary) (Class UH) visa.”

“REG 1.12AA Member of the immediate family

(1) For these Regulations, a person A is a member of the immediate family of another person B if:

(a) A is a spouse of B; or

(b) A is a dependent child of B; or

(c) A is a parent of B, and B is not 18 years or more.

- ***As the applicant was not a dependent child or a parent of Mr. AHC, but was said to be the spouse of Mr. AHC:***

“REG 1.15A Spouse

(1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:

- (a) *in a married relationship, as described in subregulation (1A); or*
 - (b) *in a de facto relationship, as described in subregulation (2)."*
- The claim was that the applicant and Mr. AHC were not in a married relationship but in a de facto relationship:

"(2) Persons are in a de facto relationship if:

- (a) *they:*
 - (i) *are of opposite sexes; and*
 - (ii) *are not married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
 - (iii) *are not within a relationship that is a prohibited relationship for the purposes of subsection 23B (2) of the Marriage Act 1961 ; and*
- (b) *they are of full age, that is:*
 - (i) *if either of the persons is domiciled in Australia -- both of them have turned 18; or*
 - (ii) *if neither of the persons is domiciled in Australia -- both of them have turned 16; and*
- (c) *the Minister is satisfied that:*
 - (i) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) *the relationship between them is genuine and continuing; and*
 - (iii) *they:*
 - (A) *live together; or*
 - (B) *do not live separately and apart on a permanent basis; and*
- (d) *subject to paragraph (e) and subregulation (2A), where either of them is an applicant for a permanent*

visa, a Student (Temporary) (Class TU) visa, a Partner (Provisional) (Class UF) visa, or a Partner (Temporary) (Class UK) visa -- the Minister is satisfied that, for the period of 12 months immediately preceding the date of application of the party relying on the existence of the relationship:

- (i) they had a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
- (ii) the relationship between them was genuine and continuing; and*
- (iii) they had:*
 - (A) been living together; or*
 - (B) not been living separately and apart on a permanent basis; and*
- (e) where either of them is an applicant for a Resolution of Status (Residence) (Class BL) or Resolution of Status (Temporary) (Class UH) visa -- the Minister is satisfied (unless the applicant can establish compelling and compassionate circumstances for the grant of the visa) that, for the period of 12 months immediately preceding 13 June 1997:*
 - (i) they had a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) the relationship between them was genuine and continuing; and*
 - (iii) they had:*
 - (A) been living together; or*
 - (B) not been living separately and apart on a permanent basis.*

(2A) Paragraph 2 (d) does not apply if:

- (a) the applicant is applying as:*
 - (i) the spouse of a person who:*

- (A) *is, or was, the holder of a permanent humanitarian visa; and*
- (B) *before that [permanent humanitarian visa](#) was granted, was in a relationship with the applicant that satisfies the requirements of subparagraphs (2) (c) (i), (ii) and (iii) and of which Immigration was informed before the visa was granted; or*
- (ii) *a member of the family unit of a person who is an applicant for a permanent humanitarian visa; or*
- (b) *the applicant can establish compelling and compassionate circumstances for the grant of the visa.”*

10. The applicant’s first ground is that the Tribunal “misapplied” the relevant test for establishing a de facto relationship. The focus of the complaint derives from subregulation 1.15A(2)(e)(iii)(A) or (B) which was taken to mean that the Tribunal needed to be satisfied that the applicant and Mr. AHC had not been living together, or had been living separately and apart on a permanent basis, so as to proceed to refuse the grant of the visa. Mr. Zipser referred to the Tribunal’s decision record at CB 211.7:

“53. Subregulation 1.15A(2) sets out the requirements for a de facto relationship, and as noted above, in this case the Tribunal is required to consider whether such a relationship existed for the period of 12 months immediately before 13 June 1997. In the visa application Mr. AHC stated that the de facto relationship commenced on 20 July 1996, when he and the review applicant commenced living together at Strathfield... The Tribunal places greater weight on information provided by way Mr. AHC in 1998 and 1999, and the statement confirming the rental arrangement, than the later recollections of the review applicant as expressed in her statement of 26 July 2004, in establishing when the review applicant and Mr. AHC commenced living at the Strathfield address. This material was made closer to the period in question, and before the issue of the date of commencement of the relationship became contentious. In the Tribunal’s view this information is reliable, and establishes that the earliest date from which it could be said that the review applicant and Mr. AHC were in a de facto relationship meeting subregulation 1.15A(2) was 20 July 1996.”

11. In written submissions Mr. Zipser pressed two points:
- 1) That it was possible that two people can “not be living separately on a permanent basis”, even though they are not living together in premises in which they share rent.
 - 2) That for a period of time leading up to 20 July 1996 the applicant and Mr. AHC stayed at each other’s places, and in spite of the Tribunal recognising that (CB 201.8):

“She came to Australia to be with Mr AHC. At the time he was living with a few single people and so it was inconvenient for her to stay with him. Sometimes she went to Mr AHC’s place and sometimes he came to hers.”
12. it still found against the applicant on the relevant issue.
13. The complaint was that the Tribunal's failure to consider the evidence of its acknowledgement that the above constituted a de facto relationship indicates a wrong assumption by the Tribunal that an element of a de facto relationship (for the purposes of the Regulations) is that two people are living together “in premises in which they share rent”.
14. In oral submissions at the hearing before me Mr. Zipser expressly abandoned any suggestion that a basis of the Tribunal's decision was that there cannot be a de facto relationship unless there is a sharing of rent. What is left of the complaint therefore is while it was relevant for the Tribunal to look at when the applicant and Mr. AHC commenced living together at the Strathfield address (given that went to the issue set out at subregulation 1.15A(2)(e)(iii)(A)), it fell into error if that is all that it did, as it overlooked the issue raised at subregulation 1.15A(2)(e)(iii)(B). That is, whether or not they had been living separately on a permanent basis. It looked at the one avenue, being whether they had been living together, but did not look at the alternative of not been living separately on a permanent basis. The submission was that this can be shown because the Tribunal only expressed its reasons for its decision by focusing on when they had been living together.

15. In response Ms. Sirtes's submission was that subclause (B) of subregulation 1.15A(2)(e)(iii) requires the Tribunal to be satisfied in respect of one, or either, of (A) or (B), and that the two are not conjunctive (the word "or"), as is the rest of what falls in subclause (e). Plainly between (i), (ii) and (iii) the word "and" is used.
16. If what is meant by Ms. Sirtes's submission is that once having satisfied itself that the applicant and Mr. AHC had not been living together (for the purposes of subregulation 1.15A(2)(e)(iii)(A)) it was not necessary to then go on and consider (B), "not been living separately and apart on a permanent basis". I do not accept that submission, and agree with Mr. Zipser to the extent that the Tribunal is required to satisfy itself as to both of the two alternatives in (A) and (B) that (A) or (B) are clearly expressed as alternatives therefore means that an applicant only needs to satisfy one to meet subclause (iii) of regulation 1.15A(2)(e). This requires the Tribunal to consider both, unless of course the applicant already meets one of the two.
17. Plainly, the requirement of this regulation in establishing whether a couple are in a de facto relationship is that for the whole of the period of 12 months immediately preceding 13 June 1997 the Tribunal needs to be satisfied that the couple had a mutual commitment to a shared life, that the relationship was genuine and continuing, and that they had either been living together or not living separately on a permanent basis. In my view, had the Tribunal found that for the whole of the period of 12 months immediately preceding 13 June 1997 the couple had a mutual commitment to shared life and the relationship between them was genuine and continuing, but that they had not been living together for the whole of that period (as it found) then it would have been necessary for the Tribunal to go on and consider whether they had not been living separately on a permanent basis.
18. The Tribunal's analysis of this issue is set out in its decision record at CB 211.7 to CB 212.4 (paragraphs 53 and 54 of its decision record). Following the "logic" of the sequence established by this regulation, the Tribunal, in my view properly, turned its mind to the issue of the "period of 12 months immediately preceding 13 June 1997". For the reasons that it gave (which were open to it on the material before it) it preferred evidence that showed that "the earliest date from which it

could be said that the review applicant and Mr. AHC were in a de facto relationship meeting subregulation 1.15A(2) was 20 July 1996” (CB 212.2).

19. The Tribunal then looked at whether the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others as required by subregulation 1.15A(2)(e)(i). While it accepted that the parties lived together at the addresses claimed from 20 July 1996 (plainly not for the entire period of 12 months immediately preceding 13 June 1997), on the evidence before it the Tribunal was not satisfied that even at that time the relationship between them involved a mutual commitment to a shared life as husband and wife to the exclusion of all others as required by sub-regulation 1.15A(2)(c)(i).
20. Given that the matters set out in regulation 1.15A(2) from (a) to (e) as to whether persons are in a de facto relationship, are conjunctive, then the Tribunal's finding that the applicant did not meet the requirements set out in sub-regulation 1.15A(2)(c)(i) was sufficient, in my view, to base its refusal of the visa. While the Tribunal stated it was not satisfied that the relationship between the applicant and Mr. AHC at the relevant time was such as to meet the requirements set out in sub-para.(c)(i), it was not attendant with such doubt as to cause it to consider the alternative. The Tribunal nonetheless did so, and found that even if the relationship at that time had met all the requirements of sub-regulation 1.15A(2)(c)(i) and (ii) it was still not satisfied that the couple met the requirements of sub-regulations 1.15A(2)(e)(i), (ii) and (iii) – “for the period of 12 months before 13 June 1997” (CB 212.4). So even in the event that the relationship did meet the requirements of subparagraph (e) (given that (i), (ii) and (iii) are conjunctive), because the Tribunal found that they did not have a mutual commitment and that the relationship between them was genuine and continuing, then any consideration by the Tribunal of what is set out at sub-regulation 1.15A(2)(c)(iii)(B) would not have assisted the applicant.
21. What must be emphasised here, as submitted by Ms. Sirtes at the hearing before me, is that the scheme of the regulation contemplates the centrality of the period of 12 months immediately preceding 13 June 1997. Presumably this means the period of 13 June 1996 to 13 June 1997. The Tribunal’s analysis and the findings as required by

sub-regulation 1.15A(2)(e)(i), (ii) and (iii), are all focused within the context of that 12 month period. As Ms. Sirtes, in my view quite correctly submitted, what happened before and in particular what happened after 13 June 1997, is in that sense “completely irrelevant”. I cannot see the Tribunal erred in making findings focused on the critical relevant period set out by the regulations (in respect of sub-regulation 1.15A(2)(e)(i) and (ii)). Its findings were open to it and any further consideration under (e)(iii)(A) or (B), in that sense unnecessary. I cannot see any error. This ground of complaint is not made out.

22. The applicant’s second ground of complaint also derives from the Tribunal’s analysis of the de facto relationship issue. Mr. Zipser referred to what is set out in the Tribunal’s decision record at CB 212.3, part of which has already been quoted above, and in particular the Tribunal’s finding that it was “not satisfied that the relationship between” the applicant and Mr. AHC on 20 July 1996 involved a “mutual commitment to a shared life and as husband and wife to the exclusion of all others” as required by sub-paragraph 1.15A(2)(c)(i). He submitted that he found this to be a “harsh or unfair finding” on the part of the Tribunal. While I did not understand Mr. Zipser to be submitting that this was sufficient to establish jurisdictional error on the part of the Tribunal I should note in this context that I agree with submissions made by Ms. Sirtes, both in relation to this ground of complaint, and in relation to ground one that findings of fact, including findings on credibility, are for the decision maker (in this case the Tribunal) “par excellence” (see *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1, per McHugh J. at [67]).
23. Whether the Tribunal’s finding was harsh or otherwise, the issue is whether the Tribunal’s factual findings were open to it on the material before it. In this regard, I accept submissions by Ms. Sirtes that even in the event that the factual findings made by the Tribunal were incorrect, this of itself would not be sufficient to amount to jurisdictional error (see *MZWBW v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 94 at [28], *Applicant A169/2003 v Minister for Immigration and Multicultural and Indigenous Affairs*

[2005] FCAFC 8 at [31] and *NAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 6 at [37]).

24. Mr. Zipser's complaint was said to be in three parts. First, that the evidence reviewed by the Tribunal indicated that at the time the applicant and Mr. AHC commenced living together the relationship involved a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that there was no evidence to suggest otherwise.
25. Mr. Zipser pointed to evidence that included:
 - 1) The applicant's evidence (CB 201.9) that she came to Australia to be with Mr. AHC, and that they commenced a relationship before they commenced living together in June or July 1996, and that further they commenced living together in Strathfield from June, or July, 1996.
 - 2) Mr. AHC's evidence (CB 207.9) that the couple had been in a de facto relationship since 20 July 1996.
 - 3) The evidence of Ms. RGP (a friend of the applicant) that on 1 May 1996 she met the applicant and Mr. AHC and they had dinner together. She observed, and felt, that the applicant and Mr. AHC were a loving couple and were happy together. (The relevance supposedly being that this was on 1 May 1996 which predates the relevant date of the commencement of the 12 month period leading up to 13 June 1997) (CB 185 and CB 211.10).
26. The complaint therefore was that there was jurisdictional error given the evidence set out above, and that there was no evidence to suggest otherwise, the Tribunal had made a finding based on "no evidence". This with reference to *SZGBD v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 431 at [42] was said to amount to jurisdictional error. This complaint is not made out. Simply there was evidence to the contrary, and the Tribunal preferred this evidence over the evidence referred to above. The applicant's evidence (at paragraph 18.1 above) that she came to Australia to be with Mr. AHC is contradicted by Mr. AHC's evidence to the first respondent's Department. The evidence which the Tribunal ultimately

accepted was that in his visa application Mr. AHC stated that the de facto relationship commenced on 20 July 1996 (see CB 3.4). This also appears to be consistent with information about where the parties resided (at relevant times), which was provided at an interview with the first respondent's Department by Mr. AHC. It was open to the Tribunal to prefer this evidence. Plainly, the complaint that there was “no evidence to suggest otherwise” is not made out.

27. Further, the Tribunal wrote to the applicant on 30 January 2004 and specifically invited the applicant's comment on the information provided by Mr. AHC, and on the addresses at which he said they lived, and on further information that in an application for another visa (a bridging visa on 23 January 1998) the applicant provided an address for the relevant time different to the one that she now claimed. The Tribunal told the applicant (CB 144.9) as to the relevance of this information to the review, that is, that if it was true it suggested that the applicant and Mr. AHC were not living in a de facto relationship for the period of 12 months before 13 June 1997, or at the date of application for the visa. Further, by way of the same letter, the Tribunal gave the applicant an opportunity to provide any further information or evidence that might demonstrate that she and Mr. AHC were in a genuine and continuing relationship as at the date of application and for the period of 12 months preceding 13 June 1997 (CB 145.7).
28. The Tribunal again wrote to the applicant on 12 July 2004 (CB 180 to CB 181). This followed the applicant's response to the earlier letter, and the applicant having given evidence at a hearing on 5 May 2004 (along with the evidence obtained from the applicant's witnesses). It wrote to her with specific reference to s.359A of the Act, again inviting the applicant's comment on the information provided by Mr. AHC as to where, and when, the applicant and Mr. AHC commenced living together. This again specifically focused the applicant's attention that for the purposes of sub-regulation 1.15A(2)(e), and in relation to the definition of “de facto spouse”, which required that the applicant and Mr. AHC had, for the period of 12 months before 13 June 1997, a mutual commitment to a life as husband and wife with the exclusion of all others, and that the relationship was genuine and continuing showing that they had been living together or were not living separate and apart on a permanent basis.

29. It is clear that the information relied on by the Tribunal, that is, the information supplied by Mr. AHC was the subject of a written notice to the applicant as to the possibility of the Tribunal relying on this information. An opportunity was given to the applicant to comment such as to satisfy the requirements of s.359A (with reference to *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24 (“*SAAP*”), and *Al Shamry v Minister for Immigration & Multicultural Affairs* [2000] FCA 1679 (“*Al Shamry*”) as illuminated by *SZEEU v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCAFC 2 (“*SZEEU*)).
30. Mr. Zipser’s second example of evidence that he says showed that the couple had been living in a de facto relationship was Mr. AHC's evidence that they had been so living since 20 July 1996. This example misses the critical point that the regulatory requirement is that the applicant meet the condition that the de facto relationship was in existence for a period of 12 months preceding 13 June 1997, that is, 13 June 1996. That Mr. AHC gave evidence that he and the applicant had been in a de facto relationship since 20 July 1996 does not cover the entire 12 month period.
31. The third example is a reference to the evidence of Ms. RGP that on 1 May 1996 (the significance being that this clearly predates 13 June 1996) she met the applicant and Mr. AHC, and she and they and others had dinner together and she “felt” that the applicant and Mr. AHC were a very loving couple.
32. Plainly, the Tribunal did not ignore this particular evidence. Its analysis (at CB 211) makes specific reference to the evidence of Ms. RGP. Nonetheless, the Tribunal (in a finding that was open to it) said that it preferred the information provided by Mr. AHC on at least two occasions, that a de facto relationship commenced on 20 July 1996 and it gave reasons for so preferring this information over the evidence of Ms. RGP.
33. In all therefore, the complaint that in determining whether there was a de facto spouse relationship in existence (it must be emphasised for the relevant 12 month period before 13 June 1997) the Tribunal did not consider the evidence to show that the applicant and Mr. AHC were in such a relationship, and that there was “no evidence to suggest

otherwise” is not made out. I can only agree with Ms. Sirtes that this is a plain attempt to challenge the factual findings of the Tribunal in circumstances where it is not open to the applicant to do so. This aspect of this complaint does not succeed.

34. The second limb of the applicant's complaint in relation to this ground as put forward by Mr. Zipser, derives from the Tribunal's statement at CB 212.2:

“54. The review applicant's statutory declaration of 29 April 2004 confirms that Mr BGH was for at least sometime at the address in West Ryde, the address at which the review applicant and Mr AHC were living at the date of the application.” (Mr. BGH was the applicant's former husband and of course the date of application is the date of application for the visa being 27 February 1998).

35. Mr. Zipser's submission was that this event, that is, given that it occurred in 1998, is irrelevant as to whether the applicant and Mr. AHC were in a de facto relationship when they commenced living together on 20 July 1996. The submission was that this was an “irrelevant consideration”, on the authority of *Minister for Immigration & Multicultural & Indigenous Affairs v Yusuf* (2001) 206 CLR 323 (“*Yusuf*”) at [69], and the Tribunal's reliance on it resulted in jurisdictional error in *Yusuf* where such an irrelevant consideration gave rise to jurisdictional error (see *Yusuf* at [82]).

36. First, I note that the information that the applicant's former husband was at sometime living at an address at which the applicant and Mr. AHC were living as at the date of application for the visa (27 February 1998), was information that the applicant herself gave to the Tribunal by way of her statutory declaration of 29 April 2004, such that this information comes within the exception contained in s.359A(4)(b), in that the applicant gave this information to the Tribunal for the purposes of the application for review as understood by *Al Shamry* and *SZEEU*. The statutory declaration was clearly provided by the applicant on 30 April 2004 following the Tribunal's letter of 30 January 2004, which amongst other things relevantly sought comment from the applicant on information before it as to the applicant's addresses during 1996 to 1998 (CB 144).

37. It is not entirely clear, nor in my view properly explained, why the Tribunal at that part of its decision record made a reference to the applicant's confirmation that her former husband was, for at least some of the time, living at the same address as the applicant and Mr. AHC. In the context of the applicant's evidence by way of her statutory declaration (see CB 166.8 to CB 167.2) it is clear that the applicant stated that she and Mr. AHC moved to the "West Ryde" address "during new years 1998". The fact that the applicant's former husband did live at the West Ryde address in 1998 does not on its face appear to be relevant to the Tribunal's critical finding that, notwithstanding that the applicant and Mr. AHC started living together from 20 July 1996 (which the Tribunal appears to have accepted), the Tribunal was not satisfied that the applicant and Mr. AHC met the requirements of subregulation 1.15A(2)(e)(i), (ii) and (iii), importantly, for the period of 12 months before 13 June 1997. The critical period is clearly 13 June 1996 to 13 June 1997. What occurred in terms of the applicant's former husband's address sometime in 1998 is, as Mr. Zipser submits, irrelevant to the question that the Tribunal was required to address and to the contextual period on which it was required to focus.
38. Ms. Sirtes's submission was that quite apart from the fact that it was the applicant who had put this information before the Tribunal for the purposes of the review, that in any event, the Tribunal did not have regard to this information in making its finding in relation to whether the relationship between the applicant and Mr. AHC met the requirements of sub-regulation 1.15A(2)(c) or 1.15A(2)(e). I accept Ms. Sirtes's submission that the reference to the residence of the former husband in 1998 did not, when the Tribunal's decision record is read as a whole, play a part in what is the Tribunal's critical, and in a plain sense, stand alone finding that the applicant and Mr. AHC did not meet the requirements of sub-regulation 1.15A(2)(e) for the period of 12 months before 13 June 1997. The former husband's residence in 1998 was not a part of the reason for affirming the decision under review. When its record is read as a whole the Tribunal's reason for this is that it accepted the statement of Mr. AHC over other evidence before it that the de facto relationship commenced on 20 July 1996 such commencement date not being for the whole of the period of 12 months before 13 June 1997.

39. I should note at this point that in determining whether a couple were in a de facto relationship for the purposes of regulation 1.15A both sub-regulations 1.15A(2)(c) and 1.15A(2)(e) require the decision maker to reach a requisite level of satisfaction that the matters required in each of (c) and (e) are made out. Therefore, while it may be arguable that the Tribunal's reference to the information about the applicant's former husband, being information provided by the applicant herself to the Tribunal, could be relevant to the Tribunal's consideration pursuant to sub-regulation 1.15A(2)(c), which does not contain the 12 month limitation contained in sub-regulation 1.15A(2)(e). In this regard therefore, what happened in 1998 is in my view not relevant to the Tribunal's consideration under (e), even though it may be relevant to its consideration under (c) which is not limited as to time. As set out above, the Tribunal's consideration under (e) was that it could not reach the level of satisfaction required that the applicant and Mr. AHC met the relevant requirements for the period of 12 month before 13 June 1997. I cannot see that the information relating to the applicant's former husband was a part of that finding by the Tribunal. Remembering also that for the applicant to succeed in establishing that she was in a de facto relationship she must satisfy each of (a), (b), (c) and (e) (sub-regulation (d) refers to visa classes for which the applicant had not applied). In all therefore, this aspect of this complaint is not made out.
40. The third aspect of the applicant's second ground of complaint is also derived from the extract from the Tribunal's finding quoted above [at 34] from CB 211.7 to CB 212.4. Specifically, the complaint is that the "only basis" in support of the Tribunal's finding referred to in that extract is the Tribunal took into account the searches of premises in which the applicant lived on 15 April 1998 and 16 August 2001 (with reference to CB 9 and CB 54), or the anonymous complaints made to the first respondent's Department on 15 November 1998 (with reference to CB 131) and 9 April 1999 (with reference to CB 32). Mr. Zipser submitted that "the fact" that the Tribunal made no reference to this evidence in its reasons for decision does not necessarily mean the Tribunal did not take this evidence into account in reaching its finding. He referred to what was said in *WAEF v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 75 ALD 630 ("*WAEF*") at [46]:

“It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons.”

41. Mr. Zipser’s further submission was that the Tribunal’s failure to expressly state that it did not rely on this evidence opens the avenue for the Court to infer that the Tribunal did rely on these matters, and if that is the case then it failed to put these matters to the applicant as required pursuant to s.359A of the Act giving rise to jurisdictional error (see *Al Shamry* and *SZEEU*).
42. First, in relation to the information of the account of the searches of the premises in which the applicant lived on 15 April 1998, this was information that the applicant herself put before the Tribunal by way of, as the Tribunal itself stated, her statutory declaration of 29 April 2004. For the purpose therefore of whether there was any obligation pursuant to s.359A, in relation to the Tribunal’s reference, that is, if it can be said that this reference is relevant to a part of the reason for its decision, then this information was put before the Tribunal, and the Tribunal relied on the very information put by the applicant herself, such as to bring this information within the exception contained s.359A(4)(b) of the Act.
43. Second, at CB 211 to CB 212, the Tribunal was not relying on any information arising from any searches of the premises conducted in April 1998, but on the applicant’s confirmation of the information that her former husband was living at that address in West Ryde in February 1998. In my view, and importantly, it was not what was set out at CB 9, that is, the report of the searches of the premises by the first respondent’s Department, that the Tribunal relied on. In fact it was the applicant’s own statutory declaration that set out that her former husband was at least for sometime living at the address in West Ryde. This is further strengthened, in my view, by the lack of any reference to any of the other matters set out in the report at CB 9. For example, that the former husband was said to have been living in the same bedroom as the applicant, and that Mr. AHC was living in another bedroom with yet another person. That the Tribunal made the, mere, reference to the former husband being at that same address for at least sometime in 1998, and the specific and express statement that this came from the applicant’s statutory declaration, and the lack of any reference to the

document at CB 9, in my view, and in these circumstances, indicates that the Tribunal did not take into account the report of the search of the premises on 15 April 1998, but only took into account what the applicant herself put to the Tribunal. The Tribunal did not refer to that piece of evidence in my view for the simple reason that it did not rely on this information, and as Ms. Sirtes submits therefore, as set out in *WAEF*, it was not necessary for the Tribunal to refer to this piece of evidence.

44. Third, the reference by Mr. Zipser now to the search of premises on 16 August 2001, and to CB 54, is a reference to a file note on the relevant file of the first respondent's Department relating to a search by members of this Department of premises at Water Street, Cabramatta on 16 August 2001. This information may indeed have been on the Department's file which was made available to the Tribunal, but on any plain reading of the Tribunal's decision record I cannot see that it played any part in the reasons for the Tribunal's refusal of the grant of the visa to the applicant. Again it should be noted that the applicant put forward the information of what occurred in 2001 (see CB 167.8 to CB 168.4) and made reference to "immigration officers" who came to the address in Cabramatta and took "old Cheng" [the name by which she referred to her former husband] away. In my view, the Tribunal plainly made no reference to this information in its decision record to the information referred to now by Mr. Zipser. Nor can it be said that this was any part of the Tribunal's decision, whether in whole or with reference to the extract of the Tribunal's decision record at CB 211.7 to CB 212.4. The Tribunal accepted that the review applicant and Mr. AHC lived together at the addresses as they claimed from 20 July 1996. But in its quite separate and independent basis for its decision, that is, that it was not satisfied that the applicant met the requirements of subregulation 1.15A(2)(e)(i), (ii) and (iii) for the period of 12 months before 13 June 1997 was clearly focused on that period, and was not dependent on or derived from anything that may have occurred in 2001. In all these circumstances therefore, it is not surprising that the Tribunal made no reference to that information, and nor can it be said that it was a basis for its decision such that its failure to refer to this evidence constitutes jurisdictional error.

45. Fourth, nor do the anonymous complaints made to the Minister's Department on 15 November 1998 (CB 131) or the complaint made on 9 April 1999 (CB 32) play any role in the Tribunal's analysis. Ultimately, that analysis led to the Tribunal's finding based on what Mr. AHC had said as opposed to the applicant's evidence, and evidence obtained from other witnesses, that the relationship did not exist for all of the period of 12 months immediately before 13 June 1997. I cannot see that the anonymous complaints played any part in the Tribunal's reasons for its decision.
46. Fifth, even if they could be said to have played some part (although it is not established by Mr. Zipser before the Court), in its assessment of whether the relationship of a mutual commitment to a shared life as husband and wife with exclusion of all others as required pursuant to sub-regulation 1.15A(2)(c)(i), it is very clear that in the separate and independent finding relating to sub-regulation 1.15A(2)(e) the Tribunal found that the anonymous information was clearly not relevant to the specific period 13 June 1996 to 13 June 1997.
47. In this regard I note what North J. said in *VBAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 965 at [33], (albeit in the context of s.424A of the Act) that if an independent and unimpeached basis can be found upon which the Tribunal decision may be supported, an error of law that may be found in another basis for that decision will not affect the validity of the decision as a whole.

“As referred to earlier in these reasons, there were four independent bases for the decision of the Tribunal in this application. There was no challenge to the second basis of the Tribunal’s decision and I have rejected the challenges to two of the other bases. SAAP does not stand for the proposition that if there be a breach of s 424A in relation to one ground upon which a decision is made, and there exists one or more other grounds upon which the decision is not or cannot be impeached, the decision nonetheless falls. SAAP was itself a case in which the only ground relied upon was a ground on which jurisdictional error was established. There was therefore no other basis upon which the decision in that case could be upheld. In the present case there are three other bases upon which the decision may be supported.”

48. This was followed and applied by Hely J., in *SZDXC v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1306 at [12] and [17], and Heery J., in *MZWPK v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1256 at [13]. The critical issue therefore, as outlined above (even if it could be said that an error of law exists in part in the Tribunal's decision), is whether there is one or more other bases from which the decision was derived and based that is not impeached. If another separate basis exists, the decision may be supported and the relief sought withheld.
49. I should note also Mr. Zipser's reference to *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72 ("*VEAL*"), which dealt with anonymous information before a decision maker. In that case the Tribunal had before it anonymous letters, but said that notwithstanding that it had this information before it, it did not act on the information contained in the "dob-in letter". In the case before me however it is quite clear, as Ms. Sirtes submitted, that "there is nothing suspect about the "absence" from the Tribunal decision" of any reference to this material because at the very least in relation to sub-regulation 1.15A(2)(e) (remembering that this is conjunctive with sub-regulation 1.15A(2)(c)) such information was not relevant to the 12 month period before 13 June 1997. It is for that reason plainly that the Tribunal made no reference to it in its decision record. In context it did not need to deal with this evidence because it was not relevant. I refer to *WAEE* at [46] as quoted above at [40].
50. I should also note that in relation to this ground generally, Mr. Zipser made reference to *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 134 ("*NAJT*"). As he subsequently advised, following the hearing before the Court, in particular to paragraphs [205]-[213] of the majority Judgement dealing with what Mr. Zipser had submitted, that it was the scope of the decision maker's obligation to have regard to information or documents that are before that decision maker.
51. In *NAJT* the Court found that a particular letter which the Court described (at [212]) as "given the potential importance of the letter",

and on the other hand “the delegate’s fleeting uncritical references to it in his reasons”, led the Court to draw the inference that the delegate did not “actually consider what significance and weight it deserved” such as the decision maker in that case could not be said to have regard to all of the information to hand when there was clearly a statutory obligation to do so, without at least giving this information genuine consideration.

52. I cannot see that this situation pertains to the case before me. On the critical issue of the relationship between the applicant and Mr. AHC, both in terms of subregulation 1.15A(2)(c) and subregulation 1.15A(2)(e), the Tribunal plainly took into account all of the evidence put before it by the applicant, and heard witnesses. I cannot see that the Tribunal had before it a situation, as in *NAJT*, where it can be said that any evidence with the “potential importance” as seen in that case applies in the case before me. The Tribunal did consider all of the relevant evidence put before it including that of the applicant and her friends. Evidence which it used adversely to the applicant was either evidence of the applicant herself, or material that had been subject to its invitation for comment in writing. In all therefore, I cannot see that *NAJT* can assist the applicant in this regard.
53. I should also note further that during oral submissions at the hearing before the Court Mr. Zipser mused as to whether the “doctrine” of Wednesbury unreasonableness may be said to apply to assist the applicant in this regard. Subsequent to the hearing, and my specific request as to the authority that might assist in making out this argument, his response was that he could find no such authority, and in fact, very fairly, made reference to *Re Minister for Immigration and Multicultural Affairs Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at [73] per McHugh and Gummow JJ. which limited Wednesbury unreasonableness to challenges to “the supposed exercise of a discretion”. On the basis of this decision Mr. Zipser subsequently submitted that “Wednesbury unreasonableness cannot apply” in the present case.
54. The third ground of complaint in the amended application relates to the issue of “compelling and compassionate” reasons. Sub-regulation 1.15A(2)(e) makes reference to the possibility of an applicant being able to establish compelling and compassionate circumstances for the

grant of the relevant visa, notwithstanding that the decision maker cannot be satisfied that for the period of 12 months immediately preceding 13 June 1997 any one of the matters set out at (i), (ii) and (iii) are not made out. In short, in what Mr. Zipser described as his ground which brought him close to, but not going over, the line of seeking merits review from the Court, was that in considering the applicant's circumstances and as to whether they could be said to involve compelling and compassionate reasons for the grant of the visa the Tribunal made no reference to "the fact" that the applicant had lived in Australia for 10 years, and to the disruption which would be caused to her if she was required to return to China. The submission was that with reference to *Singh v Minister for Immigration and Multicultural and Indigenous Affairs* (2001) 109 FCR 152 (at [60]-[68]) it is open to the Court to conclude that the Tribunal, because of its failure to make any reference to these matters, overlooked them, and on the basis of *Yusuf* at [82] thereby fell into jurisdiction of error.

55. Ms. Sirtes referred the Court to *Babicci v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 77 ("*Babicci*"), which considered the issue of "compelling circumstances". The Tribunal plainly did turn its mind to the issue of compelling and compassionate circumstances (see CB 212.5 to CB 213.6). The Tribunal identified the importance of this issue when it wrote to the applicant on 30 January 2004 (CB 144 to CB 145) and amongst other things, sought further information or evidence from the applicant of whether there were compelling and compassionate circumstances for the grant of the visa in the event that the Tribunal were to find (as it subsequently did) that she and Mr. AHC were not in a de facto relationship for the 12 month preceding 13 June 1997.
56. While the applicant's then migration adviser appears to have responded to the first part of that same letter, which was the request for comment on specific information given to the Tribunal, he does not appear to have responded to the Tribunal's additional request in relation to compelling and compassionate circumstances. Other than the one reference to the applicant's representative's subsequent submission (CB 212.8) that there are compelling and compassionate reasons for the applicant to stay in Australia to look after her son there does not appear

to be any other particular and express response to the Tribunal's request for comment on this issue.

57. The Tribunal clearly looked at this particular claim made on the applicant's behalf. It found that in any event as the applicant's son was not able to satisfy the relevant requirements for a visa, and noted in particular at CB 213.4 that if the applicant's son met the relevant secondary criteria and could be granted a visa in his own right that could be an additional factor in considering whether there are compelling and compassionate circumstances for the grant of the visa to his mother. But nonetheless found that he did not so meet that set of relevant criteria. That, and in particular the presence of the applicant's family in China, led the Tribunal applicant to the view that there were not compelling and compassionate reasons such as the visa should be granted to the applicant.
58. In all the circumstances before me I cannot see that this complaint can be made out. I say this with the relevant circumstances of this case in mind and in light of *Babicci*, to the extent that it is relevant guidance on the issue of “compelling” circumstances, and even in light of *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263 (“*NABE*”) (particularly at [55] to [63]), in the sense of whether the issues now raised by Mr. Zipser on the applicant's behalf were so squarely raised on the evidence before the Tribunal that it should have been a compelling circumstance that needed to have been specifically considered. I cannot see that such a situation exists in the case before me. I am persuaded, given that the Tribunal was aware, and so stated that the applicant had arrived in Australia on 1 May 1995 and set out (see CB 200) the circumstances of her arrival. It was specifically directed to, and considered the issue of the applicant's son. Further, and in context, when the Tribunal said in its decision record (at CB 213.5) that it considered all of the applicant's circumstances, it can be inferred that the applicant's stay in Australia and its review of what had relevantly occurred, in view of its finding of the presence of her family in China, that it did consider all of the relevant circumstances. It must be remembered, that despite specific invitation to do so, the applicant made no mention of her 10 years in Australia, and any subsequent disruption to her life by returning to China in the context of compelling and compassionate circumstances.

To the extent that it is argued that this was obvious and should have been considered, then on a contextual and holistic reading of its decision record, the Tribunal in my view did consider all of the relevant circumstances. I cannot see that the Tribunal had before it a situation as set out in *NABE*. It was entitled to come to the conclusion that it did on what was before it.

59. Beyond the circumstances set out in *NABE* the line in my view is then crossed into seeking impermissible merits review from the Court (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259). In all therefore this complaint is also not made out.
60. I cannot see, for the reasons set out above, that the grounds as put forward by the applicant in the amended application and the complaints as submitted by Mr. Zipser are made out. This application is therefore refused as no jurisdictional error is revealed on the basis of these grounds.

I certify that the preceding fifty-nine (59) paragraphs are a true copy of the reasons for judgment of Nicholls FM.

Associate:

Date: 15 December 2006